NO. 83-1418

In the Supreme Court of the United States

October Term, 1983

City of Little Rock, et. al.,
Petitioners,

v.

Johnnie Gilbert, et. al.,
Respondents.

RESPONSE TO A PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VOLUME I

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QUESTIONS PRESENTED

I. WHETHER THIS IS A PROPER CASE FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

II. WHETHER THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURT OF APPEALS.

III. WHETHER THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS FAIR AND ACCURATE.

IV. WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY EXERCISED ITS APPELLATE AUTHORITY IN REMANDING THE CASE AFTER CONCLUDING THAT THE DISTRICT COURT'S ANALYSIS OF THE LRPD PROMOTIONAL SYSTEM WAS NOT PROBATIVE BECAUSE IT WAS BASED ON AN ERRONEOUS LEGAL STANDARD.

PARTIES INVOLVED

The parties involved in this petition are: the City of Little Rock, Arkansas; the Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson; Carlton E. McMullin; Mahlon Martin; Susan Fleming, as Petitioners, and Johnnie Gilbert, Horace Walters, Andrew Lockhart, Billy O'Donald, Julius Bryant, Jack Matlock, Maxie Alexander, Jessie Briscoe, Grady Anthony, Marcella Wilson, Larry Brazzelle as Respondents.

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The respondents, Johnnie Gilbert, et. al., respectfully pray that this Court deny the Petition for Writ of Certiorari and allow the remand of this case to proceed as ordered by the Eighth Circuit Opinion of November 29, 1983.

OPINIONS BELOW

The Appendix to the Petitioners' Writ of Certiorari is hereby adopted by the Respondents herein.

Excerpts from the testimony of C. Hunter, L. Hollingsworth, Dr. J. Outtz, G. Anthony, and Chief W. Simpson appear as Appendix A, B, J, K and L, respectively. Additionally, several exhibits introduced during trial appear as Appendix C, D, E, F, G, H, I and M.

JURISDICTION

Petitioners' jurisdictional statement is accepted by Respondents.

STATUTES, RULES, AND ORDINANCE INVOLVED

The statutes, rules, and ordinance involved as set out in the Petitioners' Writ of Certiorari are hereby accepted by the Respondents. However, Respondents are also relying on Rule 17 of the Supreme Court Rules.

STATEMENT OF THE CASE

This action involves the impact of the Little Rock Police Department's (LRPD) employment practices and promotional decisions on black officers employed by the City of Little Rock. In 1978, there were 14 black officers on the LRPD, and of those 14 officers, 12 filed EEOC charges on September 27, 1978, alleging they had been discriminated against in promotions because of their race. They then filed their action in the Federal District Court of Arkansas, Eastern Division, on September 28, 1978, and February 22, 1979. The case was not certified as a class action; however, the plaintiffs consisted of substantially all of the black police officers working for LRPD because they represented 12 of the 14 black policemen on the police force.

The District Court found that the Plaintiffs, Respondents herein, made a prima facie case on the issue of disparate impact in the promotional process. (Memorandum Opinion of the District Court at 21, hereinafter "D.Ct.") (Petitioners' Appendix at B23, hereinafter "A." B23) Furthermore, the District Court found that several of the Respondents did make prima facie cases of discrimination in promotion. (D.Ct.A. B60)

After finding the Respondents established a *prima facie* case of *disparate impact*, the District Court found that the case of adverse impact was rebutted because the City, Petitioner herein, presented rebuttal evidence that undermined the accuracy and significance of Respondents' statistical evidence. The District Court came to the conclusion that there was no adverse impact in the written test or any of the subparts of the promotional process. This latter conclusion was based on comparisons between the average composite, oral and service scores for whites and blacks. (D.Ct.A. B3); (Memorandum Opinion of the Circuit Court at 9 hereinafter "C.Ct.") (Petitioners' Appendix at A8, hereinafter "A."A8) The District Court also found *prima facie* cases of *disparate treatment* in promotions and that these cases were successfully rebutted by the Petitioner on the basis of the promotion system itself. (D.Ct.A. B60)

The selection procedure for promotion used at the LRPD involved a rank ordering of composite scores. In this selection procedure the candidates who were competing for the promotional opportunities that might become available during the following year were given a writtem test. Those individuals who passed the written test were then allowed to proceed with the other factors of the promotional process. These other factors included an oral interview, a seniority rating, a performance appraisal, and chief's points. Each candidate received a score for each component of the promotional process which, when added together, results in a final composite score. After a composite score was obtained for each candidate, the candidates were placed on the list in rank order with those scoring the highest being first and receiving the promotions, and those scoring the lowest ranked at the bottom and not being promoted. This certified list was valid for a one year period. Therefore, in view of the fact that LRPD used a rank order list in its promotional process, any differences in the composite score of the candidates were treated as meaningful, and the difference between number one on the list and number ten on the list was almost always a minute difference.

The Relevant Time Frame (hereinafter referred to as RTF), dated from September 27, 1978 back to and including September 27, 1975. During the RTF there were 19 promotions to sergeant at the LRPD, and of these promotions there were 19 whites promoted to sergeant and 0 blacks promoted to sergeant. It should be noted at this point that there was 1 black promoted to sergeant in 1975; however, that was in July, 1975, and as such was outside the RTF. In addition to the 1 black promotion in 1975 that was outside the RTF, there were also 6 white promotions to sergeant that year outside the RTF; (Jt. Ex. 13) (Respondents' Appendix at D1; hereinafter "R.A." D1) therefore, if the 1 black promotion in 1975 is included, then out of 26 promotions during the years 1975, 1976, 1977, and 1978, inclusive, there would be 1 black promotion and 25 white promotions. However, as referred to above, the actual figures for the RTF are 19 white promotions and 0 black promotions.

Perhaps part of the reason that blacks were not promoted at LRPD was because there were so few blacks hired. In the 3 years prior to filing of this lawsuit, the hiring was as follows:

Year	No. Blacks Hired at LRPD	No. Whites Hired at LRPD	Total Blacks
1975	3	21	14
1976	1	24	15
1977	0	7	15
1978	0	18	14

(DX. 7A-4; R.A. I1); (PX. 1-3; R.A. C3)

Suffice it to say that during the RTF the total number of blacks at LRPD remained constant. Likewise, the promotion rate for blacks remained constant as evidenced by the 0 promotions.

It is significant to note that Grady Anthony, who is the black police officer previously referred to as being promoted in July of 1975, was only the second black police officer in the history of the LRPD to rise above the rank of patrolman. The only other black police officer to ever be promoted above the rank of patrolman was Clarence Hunter who rose to the rank of assistant chief and retired prior to trial. Assistant Chief Hunter testified that he was held back in promotions because of his race and that he received his promotions only after political pressure was applied by members of the Civil Service Commission. Furthermore, he testified that he encountered racial problems at LRPD. (T. 289-296) (R.A. A1-A7)

There had always been only one assistant chief at the LRPD; however, when Hunter was made assistant chief, there was also a white police officer who was appointed as a co-assistant chief. It should be mentioned that even though Hunter had worked at the LRPD longer than his white counterpart, his counterpart received a higher wage. (P. Ex. 8) (T. 1613-1615). (R.A. A7) Clarence Hunter also testified that in addition to him encountering racial problems in promotion, he knew that the plaintiffs had also encountered racial problems in

their efforts to gain promotion. (T. 295) (R.A. A6) Respondents feel the need to make this Court aware of the fact that in addition to the problems encountered by Hunter in promotions, when he was assistant chief, his office was located in a part of the building that was separated from all of the other executive offices. In other words, the only black executive officer was segregated and his name was not included in the executive directory on the chief's door. (T. 483) (R.A. B2)

As indicated above, the whites received 100% of the promotions to sergeant and lieutenant during the RTF, while the blacks received 0% of the promotions to sergeant and lieutenant, even though they constituted 6.5% of the work force. Additionally, from 1975 to 1979, inclusive, the whites received 25 promotions while the blacks received 1, and therefore, the whites received approximately 97% of the promotions during these 5 years while the blacks received 3% of the promotions. During this same period of time, there were 10 blacks seeking promotion and only 1 was promoted. While there were 25 whites promoted out of 146 seeking promotions, the respective promotion rates are 10.0% for blacks and 17.1% for whites. A comparison of these rates indicates a violation of the four/fifths rule as set forth in the Uniform Guide Lines. (PX. 1-3, 1-4, R.A. C3, C5) (Jt.X. 13-1, R.A. D1) (DX. 7B-3; R.A. E1)

During the RTF the black officers received 0% of the promotions to sergeant, and the whites received 100% of these promotions. Thus, there were 19 whites promoted to sergeant and 0 blacks promoted which again would produce a four/fifths rule of violation. If one looks only at the years of 1975-1978, inclusive, you would find that 1 black was promoted out of 8 as compared with 25 whites promoted out of 129. This again produces a four/fifths rule violation with the respective promotion rates being 12.5% for blacks and 19.4% for whites. Again, during the RTF there were 0 blacks promoted to sergeant or lieutenant because Grady Anthony was promoted to sergeant outside the RTF. (dismissed, *infra* at 7, 8)

The prima facie showing of adverse impact included hiring statistics, offered as corroborative and background evidence, which revealed that in 1977, 1978, and 1979, there were 67 blacks who competed to be hired by LRPD as opposed to 262 whites. There were 27 blacks and 120 whites who passed the exam and were eligible for hiring. There were 7 blacks hired and 67 whites. This ratio results in 10.4% of the blacks being hired as compared with 20.2% for whites. This produces a four/fifths rule violation according to the Uniform Guide Lines. (PX. 2; R.A. F1) (DX. 7-A7; R.A. G1)

Although this case is not a hiring case, it is significant to note that after the findings of the District Court but prior to the findings of the Circuit Court, the United States Justice Department entered into a *consent decree* with the City of Little Rock on the issues of the *hiring practices* for the Police Department. This case is cited as case No. LR. C-83-409.

Part of the promotional process used by LRPD consisted of an oral interview. The oral interviews that were conducted for promotions to sergeant at LRPD in 1975-1977 *did not* have standardized questions or standardized responses. In 1978, standardized questions were developed but *no standardized responses* were implemented. It was not until 1979, after the filing of this lawsuit, that standardized questions and some form of standardized responses were developed by LRPD.

It should be noted that the blacks did better on the 1979 promotion test, but there were no promotions made from this list because it was enjoined by a State Court action and thus there were never any permanent promotions made from the 1979 sergeant's list. The Circuit Court found that 2 blacks, Walters and O'Donald, were promoted from the 1979 list as acting sergeants but their status could not be changed to regular sergeant without participating in the promotion process again; therefore, Grady anthony was the only black permanent sergeant promoted from 1975 until January, 1982, the date of the trial of this lawsuit. (C.Ct. A. A9) As previously pointed out, Grady Anthony was actually promoted outside the RTF. During the RTF there were 0 blacks promoted.

The only black to be eligible to compete for promotion to lieutenant during the RTF was Grady Anthony because he was the only black sergeant during this time. Anthony was prevented from being promoted in 1979 because of his oral interview score for that year; however, he had, in fact, made a 100 on the oral interview in 1978.

Finally, Grady Anthony took the exam again in 1980, making a 100 on the written exam. On this occasion, the city decided not to complete the exam process. The only reason given by the city for not completing the exam was that the city attorney so advised. (T. 1574) No further explanation as to why the city attorney gave this advice was offered. Under these circumstances, Chief Simpson created a "homemade" list and even though Anthony "died" number 2 on the last certified list in 1978 he was not included on the "homemade list". Four whites were promoted to acting lieutenant from the "homemade list", and subsequently, each of the four were made permanent lieutenant. The four who made permanent lieutenant were ranked 5, 6, 9 and 10 on the 1978 list wherein Anthony was ranked number 4. (Jt.X.20, R.A. H1)

These four promotions to permanent lieutenant were made in accordance with a Consent Decree entered in the Circuit Court of Pulaski County, Arkansas, whereby the City of Little Rock agreed to the promotion of these four acting lieutenants, who were all below Grady Anthony on the 1978 list to the permanent lieutenant. The four men promoted were P. Plummer, B. Thomas, J. Vandiver, P. Gatewood. (See promotion list JX.20; R.A. H1) (DX. 9)

Since the promotion system used at LRPD is a rank ordering of the composite scores, the critical factor in being promoted is not to be placed on the certified list but to be placed at a high standing on the list. This is especially critical in view of the fact that the certified list automatically expires at the end of one year. (C.Ct. A. A10)

In 1979, Horace Walters, Johnnie Gilbert, and Andrew Lockhart all made 99 on the written test; however, their oral

scores were such that it kept them low on the 1979 certified list. This in turn kept them from being promoted in 1979. The average black score was comparable to the average white score on the oral interview, but the fact was these 3 blacks who made 99 on the written test did not receive an oral score sufficient to allow them to be promoted.

The Circuit Court on November 29, 1983, reversed the District Court's decision and remanded the case to the District Court for further consideration of the interrelationship of the component parts of the promotion system saying that the District Court's analysis of the promotion system in comparing the average scores was not sufficiently probative because it did not focus on the interrelationship of the component parts in a system that rank orders the composite scores. (C.Ct.A. A9)

ISSUES

This is simply a case of an appellate court discerning that the findings of the District Court are infirm because of an erroneous view of the law, and therefore, the appellate court has remanded the case for further proceedings to permit the trial court to make findings of fact consistent with the proper application of the law.

This case is not a further extension of *Connecticut v. Teal*, 457 U.S. 440, 73 L.Ed.2d 130 (1982), as the Petitioners would lead this Court to believe. The facts in the case at bar are clearly distinguishable from those found in *Teal*. The primary distinguishing factor is the use of the rank order system by the LRPD, which was not found in *Teal*. Furthermore, the District Court found that there was a *prima facie* case of *disparate treatment*, as well as *disparate impact* in this case, and lastly, there is a bottom line adverse impact in *Gilbert*, which was not found in *Teal*. All of these factors will be discussed in greater detail below.

I.

INTRODUCTION

Respondents feel the need to make this Court aware of certain salient facts that should be considered throughout the reading of this brief.

Respondent, police officers working for petitioner, LRPD, filed this lawsuit in an effort to change a promotion selection system that had resulted in 0 blacks being promoted from September 1975 to September 1978. This same system had a component part known as an oral interview that was conducted in a manner that can best be described as "highly subjective" and susceptible to racial abuse.

The black police officers involved in this lawsuit had experienced several years of making high scores on the written exam but being excluded from the promotion selection system by the oral interview. As a matter of fact, during the entire history of LRPD there had only been two promotions of black personnel and one of these persons, Grady Anthony, was a plaintiff in this lawsuit. The other person is Clarence Hunter.

The oral interview which was used as a part of the promotion selection procedure was described by Dr. Jim Outtz, who has a Ph.D. in industrial psychology, as little more than an "opinion poll" and as "having little value in determining the actual attributes that the applicants possessed". (Outtz T. 21; R.A. J1) The problems of the oral interview were further complicated by the fact that the panelist members had access to the candidate's written score prior to being tested in the oral interview. (T. 1630-1632; 1557-1560) (R.A. K1-K2, L1-L3). Dr. Outtz testified that the oral interview panel could indeed be biased in its assessment of candidates by the panelists' knowledge of the candidate's written test score. (Outtz, T. 21; R.A. J1).

The respondents will discuss the following topics in order as they appear in succession throughout the remainder of this brief:

1. This is not a proper case for certiorari because no new and novel legal theory is involved; the case of *Teal* is distinguished and the Circuit Court reached the proper decision and exercised its review power in a proper fashion;

2. The proper focus in determining adverse impact in a rank order selection procedure is on the interrelationship of the component parts because each point is treated as meaningful and therefore this analysis must go beyond the simple comparison of averages. This is especially true in dealing with the system that produces an overall bottom line adverse impact in the ultimate selection promotion rate;

3. The proper focus of the District Court in dealing with a rank order system is on the subparts of the promotion procedure because of their interrelationship and the Court of Appeals was proper in reversing and remanding this case for this type of analysis;

4. The Court of Appeals properly applied the "clearly erroneous" rule and reversed this case for a decision based on an erroneous legal standard and correctly remanded the case to the District Court;

5. The Court of Appeals did not make its own findings of fact and nothing in its opinion was inconsistent with the findings of fact of the District Court;

6. The Circuit Court of Appeals' decision to remand the case to the trial court was a proper exercise of its appellate jurisdiction in ordering the District Court to probe deeper into the promotion selection system of the petitioner, LRPD.

II.

THIS IS NOT A PROPER CASE FOR CERTIORARI

Realizing that this Court has judicial discretion to grant a Writ of Certiorari to review this case, it is well settled that a Writ of Certiorari "will be granted only when there are special and imporatant reasons therefore". Rule 17 of the Supreme Court Rules outlines what this Court considers to be "special and important reasons" and Respondents submit there are none in this case. Also, there are no other decisions in other circuits in conflict with the decision rendered in this case. Here, the Court of Appeals applying existing law, simply stated that the manner in which the District Court analyzed the promotion system was not probative. The reason it was not probative is that the District Court failed to take into consideration the interrelationship of the component factors in its analysis of the promotion system. Such an analysis is essential in a promotion system that rank orders a composite score. Certainly, the Court of Appeals in remanding this case for the reasons set out above has not departed from "the accepted and usual course of judicial proceedings". It was the holding of the Circuit Court that the District Court applied an erroneous legal standard in rendering its decision when it failed to focus on the interrelationship of the component parts of a rank order composite score system. Therefore, this is not a proper case for certiorari.

Petitioner states that this case is an extension of *Teal v. Connecticut*, and Respondents will now address this contention and distinguish *Teal* from the case that is now before this Court. Respondents will then discuss the fairness and accuracy of the decision of the Circuit Court. Respondents finally will discuss the reason the Circuit Court reversed this case and remanded it to the District Court.

A. PETITIONER'S APPLICATION OF *TEAL* IS INCORRECT.

Petitioner argues that the law as established in *Teal v. Connecticut*, has been extended by the Eighth Circuit opinion in this case. *Teal, supra*, is distinguishable from the case at bar for the following reasons:

1. *Teal* did not involve a composite score rank order promotion system.

2. *Teal* did not have a bottom line adverse impact and the case at bar does have a bottom line adverse impact as evidence by the 4/5 rule violations discussed, *infra*.

3. In *Teal*, the government had initiated and was complying with an affirmative action plan whereby minority employees were being promoted which does not exist in this case.[1]

The District Court in the case at bar found that the Respondents made a *prima facie* case of *adverse impact*. (D.Ct. 57; A.B60) (C.Ct. 8; A.A8) The District Court then made the finding that this prima facie case was rebutted in part by the evidence of the Petitioners which compared the average scores of candidates for promotion. Based on this comparison of the average scores, the District Court made a finding that the subparts of the promotion system at LRPD had no adverse impact. (D.Ct.A. A32) (C.Ct.A. A8) This comparison of averages was an attempt by the Court to look at the interrelationship of the subparts of the promotion system used at LRPD. The interrelationship of the subparts is a *critical* analysis because of LRPD's *rank ordering* of the *composite score* in promotions. The District Court recognized this interrelationship but failed to properly analyze it.

The District Court's analysis of comparing averages was not probative on the issue of adverse impact. The interrelationship created by the rank ordering of composite scores caused the Circuit Court to require a more probative analysis than simply comparing the averages. The Circuit Court, applying existing law, on remand required the trial court to make a more probative analysis of the interrelationship because statistical

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[1]LRPD Affirmative Action Plan (AAP); Although LRPD maintained that an AAP existed as early as 1973, City Manager, Mahlon Martin admitted none existed prior to 1979. (T. 550, Jt.Ex.3) The Apps for 1979 through 1983 were so unacceptable that Chief Simpson tried to deny their authenticity until confronted with his signature. (Jt.Ex. 3, 4, & 5; T. 1589-1590) (R.A. L4-L5) There were no black promotions from Sept.'75 to Jan. 1982.

proofs must be properly tailored to the specific allegations, so that any inferences drawn will be relevant and probative.[2] This holding is similar to holdings in prior cases requiring employer's statistics to be responsive to specific issues presented or not be considered. This type of reasoning is present in cases previously cited as well as in landmark cases such as *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736 (1977). The Circuit Court is simply requiring the statistics used by the District Court in analyzing the interrelationship of the subparts of the promotion system to be probative.

For the above cited reasons, Respondents submit that *Teal* is distinguishable from this case and is not an extension of *Teal*. Respondents will now discuss reasons why the Circuit Court's decision is fair and accurate.

B. BECAUSE OF THE RANK ORDERING OF THE COMPOSITE SCORES USED IN THE PROMOTION PROCEDURE AT LRPD, THE DECISION OF THE COURT OF APPEALS IS FAIR AND ACCURATE.

Petitioner has argued that the analysis of the interrelationship of the subparts of a promotion system should consist of nothing more than a comparison of the averages and that this would be the correct way to analyze such a system. There are at least two threshold questions that should be asked at this point:

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[2] *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 11 FEP Cases 211, 221 (10th Cir. 1975), See *Rios v. Enterprise Assn Steamfitters, Local 638*, 501 F.2d 622, 633, 8 FEP Cases 293, 302 (2d Cir. 1974), where the court was considering a remedial hiring quota and stated that "from the outset, the court should be guided by the most precise standards and statistics available." And in *EEOC v. Datapoint Corp.*, 570 F.2d 1264, 17 FEP Cases 281, 286 (5th Cir. 1978), the Court emphasized that "while statistics are an appropriate method of proving a prima facie case of racial discrimination, such statistics must be *relevant*, *material* and *meaningful*, and not segmented and particularized and fashioned to obtain a desired conclusion." (emphasis added)

(1) Why is an analysis of the interrelationship of the component parts of the promotion system essential in determining adverse impact?

(2) Why is a comparison of average scores not considered a sufficient probative analysis by the Circuit Court?

In the case at bar, a comparison of the average scores of blacks and whites in the component parts of the promotion system reveals that the averages compare favorably. However, when examining the oral interview scores, we find that each black who made a sufficiently high score on the written exam to be considered in the running for a high composite score, and therefore, a high ranking on the list, made a sufficiently low score on the oral interview to remove him from the competition. Now, such occurrences would not generate much concern if they were isolated instances; however, the Court of Appeals stated that if such occurrences occur with greater frequency than statistical analysis would support as being normal, this component would operate in a racially disparate manner. (C.Ct. A.A12)

How can Petitioner say that a comparison of average scores is a fair and accurate way of determining adverse impact for a rank order composite score promotion system? The averages can be the same and adverse impact can still exist. A mere comparison of the average scores can be meaningless. When you have small numbers, averages are more susceptible to manipulation. A promotion system can produce 0 black promotions even when the averages are comparable.

Respondents will now discuss the reason it is not proper to grant certiorari when the Circuit Court reverses the District Court for applying an erroneous legal standard.

C. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN ITS REVIEW OF THE RANK ORDER SYSTEM USED AT LRPD.

The decision by the Circuit Court is clearly proper and there is no conflict among the various circuits concerning the

power of the Circuit Court to remand a case when the District Court has made findings that rest on an erroneous view of the law. In *Pullman Standard v. Swint*, 102 S.Ct. 1781, 1792 (1982), this Court stated that where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *See also, Kelly v. Southern Pacific*, 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974). The Circuit Court has the authority to order the District Court to focus on the interrelationship of the component parts of the rank order system and did not abuse its authority when it remanded this case.

It has consistently been held that the Circuit Court has authority to remand cases if their findings of fact are based upon an *erroneous legal standard*. In fact, the Eighth Circuit Court of Appeals remanded the case of *Firefighters Institute v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980) cert. denied, 452 U.S. 938 (1980), on three separate occasions. The reason this case was remanded in the first instance was the application of an erroneous legal standard by the trial judge. It is interesting to note, that at the conclusion of each remand issued by the Eighth Circuit Court of Appeals, the defendants petitioned for Certiorari and each time the petition was denied. See *Firefighter I*, 434 U.S. 819, 89 S.Ct. 60 (1977); *Firefighters II*, 443 U.S. 904, 99 S.Ct. 3096 (1979); and *Firefighters III*, 452 U.S. 938 (1980). The situations found in the *Firefighter* cases are analogous to that one found in this case.

Additionally, *Firefighter, supra*, reveals that a detailed comparison of the interrelationship of the subparts is the advisable method for a procedure such as an oral interview as indicated in the following quote:

> During this training, 26 assessors participated in an exercise designed to demonstrate the reliability of their scores. Although the District Court was persuaded by the results of this exercise, we are not. The *raw data* shows substantial variance among the ratings given by the assessors in the exercise. The statistical co-efficients of correlations derived by St. Louis from the exercise

> give an *incomplete picture* of the reliability of the procedure. First, the co-efficient does not measure the differences in scores given by the assessors, but measures only the correlations in their relative ratings. *For example*, one assessor might give three scores to three individuals—a four and two 5's—and another assessor might give scores of 1, 2, and 2. The analysis used to produce the co-efficients of correlation results in those sets of scores *correlating perfectly*, even though the *actual ratings differ*. Second, the analysis does not address the reliability of the assessment of the candidate's behavior, but only of the scoring procedure. This *missing* piece of analysis is an important aspect of the reliability of the assessment center portion of the examination. (*Firefighter*, supra at 362) (Emphasis added)

The above quote reveals the falicy of simply comparing the averages to determine the validity of a system. The comparison of the averages can yield a distorted picture on either side. For this reason the Circuit Court ordered the District Court to probe deeper into this promotion system to determine if it operates in an unlawful discriminatory fashion.

The Circuit Court stated in its opinion that the District Court applied an erroneous legal standard in reaching its findings of fact therefore, the Circuit Court remanded this decision to the District Court so that the proper legal standard may be applied. Respondents submit that this Court should deny certiorari in this case as it did in the *Firefighter* case.

This is not a proper case for certiorari because it is not something that the Circuits are in disagreement about, it is not a unique rule of law nor is it an unfair or incorrect decision. Respondents will now discuss the interrelationship of the subparts of the LRPD promotion system.

III.

IN A COMPOSITE SCORE RANK ORDER SELECTION PROCEDURE FOR PROMOTION THE FOCUS OF

ADVERSE IMPACE SHOULD BE ON THE INTER-RELATIONSHIP OF THE COMPONENT FACTORS.

The promotion system for LRPD consists of a written test, an oral interview, performance appraisals, seniority and in some years chief's points. Each of these subparts results in a score and these scores are added together in one composite score which determines the candidate's position on a rank order list. Therefore, each point is treated as meaningful.

In order to analyze such a system for adverse impact one must consider the interrelationship of the subparts. It is understandable that such a system could produce averages that are comparable and yet not yield any promotions. This is what happened in the case at bar.

The blacks were competing through the promotion cycle but were receiving no promotions. In 1978, when this lawsuit was filed, there were 6 blacks that passed the written exam. Out of these six (6) that passed, there were three (3) that made 99. However, when these men progressed through the promotional cycle into the oral interview they were effectively excluded from the promotion cycle. There were 11 whites promoted and 0 blacks.

The oral interview consisted of four (4) questions that were given to each candidate with no standardized responses. By this it is meant that it was left entirely up to the discretion of the grader on the oral interview panel as to what response would be acceptable for a good grade.

The oral interview panel consisted of four (4) white captains and one (1) black captain. The olympic method of grading was used whereby the high score and the low score were thrown out. Therefore, the oral interview score was determined by three (3) of the panel members scores.

It is significant to note that the black panel member was Clarence Hunter, who is the only black to rise above the level of sergeant at LRPD and he retired prior to the trial of this

lawsuit. Hunter testified that he was discriminated against and that the plaintiffs of this lawsuit were discriminated against in promotions. (*Supra*, at 5)

In looking at the whites promoted in 1978, there were 11 whites and the average oral interview score of these 11 whites was 16.30. The average oral interview score of the 6 black police officers who completed the promotion cycle was 13.51, which was 2.79 points less than the whites. Although 2.79 points may not seem like a very large difference at first glance, if one were to add 2.79 points to Johnnie Gilbert's and Horace Walter's overall composite score then both Johnnie Gilbert and Horace Walters, both of whom are black, would have been promoted in 1978. As a matter of fact, Johnnie Gilbert would have been No. 4 on the promotion list and Horace Walters would have been No. 7 on the promotion list. This analysis points out the fact that a simple comparison of the average scores is not probative because the issue is reachability. Reachability is defined as obtaining a composite score that places the candidate sufficiently high on the rank order list to be considered for promotion.

This illustration demonstrates the importance of the oral interview and the interrelationship of the subparts in a rank order composite score system. The District Court simply looked at the overall averages of all whites versus all blacks and from this comparison made the determination that the written exam and all subparts were valid.

The Circuit Court decided the District Court failed to properly focus on the interrelationship of the subparts because it failed to adequately analyze the system to see what was happening to the blacks as they continued through the promotion cycle competing ultimately for a position on the rank order list.

The Circuit Court did not find that there must be a correlation between the written and oral scores for all individuals but it stated that if blacks are being excluded from promotion then one must look at the promotion selection system. When a rank order composite score system is being used then an examination of the subparts is required to see if one part of the selection

procedure is excluding blacks from promotion at a significantly different rate than whites. The Circuit Court ordered an analysis to determine if there was a low correlation between the written scores of blacks and their scores on the more subjective parts of the promotional process because of LRPD's rank order composite score system. Therefore, if a low correlation exists, then the District Court must examine the subpart causing the low correlation with close scrutiny to determine if it is being conducted legally. In the case at bar the oral interview was the subpart that was excluding blacks. Respondents submit the oral interview cannot withstand a close scrutiny analysis because of its subjective nature.

A discussion of the District Court's action of comparing averages to reach its decision that the subparts of the promotion system did not have adverse impact follows.

A. IN ANALYZING A COMPOSITE SCORE RANK ORDER SYSTEM FOR ADVERSE IMPACT IT IS INADEQUATE AND THEREFORE IMPROPER TO LIMIT THE SCOPE OF INQUIRY TO A COMPARISON OF AVERAGE SCORES FOR WHITES AND BLACKS.

The overall composite score is arrived at by combining the scores on the subparts of the promotion procedure into a composite score which determines where a candidate is placed on the certified list. To simply compare the averages in a system such as this is not a probative analysis. To fail to take into consideration the interrelationship of all of the component parts of the promotional system would be like putting blinders on; or to ignore the interrelationship would be similar to ignoring the interrelationship required of both legs in the task of walking.

Respondents feel the need to direct this Court to the testimony of Dr. Jim Outtz concerning the comparison of averages approach to analyzing the promotion system at LRPD. (T. 1636; R.A.J2, J4) It should also be noted that a comparison of the experts reveals Dr. Outtz to have 109 hours in Industrial Psychology, and the Petitioner's expert Dr. Oschman to have a total of 6 hours in Industrial Psychology. (T. 1663, 959; R.A. J5-J6; J7-J9)

The District Court's failure to go beyond a comparison of the averages and to delve deeper into the subparts to see why no blacks were being promoted was an inadequate focus on the subparts of the promotion procedure. The Circuit Court instructed the District Court to examine the promotion procedure in more detail and to focus on the rank order aspect of the selection system. (C.Ct.A.A9, A11)

Respondents feel that the following discussions of the pool of qualified black individuals and the 4/5's Rule Violations will be of special interest to this Court.

B. A COMPARISON OF THOSE PROMOTED TO THE POOL OF QUALIFIED INDIVIDUALS IN THE WORK FORCE IS A PROPER FOCUS FOR A DETERMINATION OF ADVERSE IMPACT IN A RANK ORDER SYSTEM.

During the RTF there were 19 whites promoted to sergeant and 0 blacks. During this same time there were 5 whites promoted to lieutenant and 0 blacks. In reviewing the total number of sergeants, there were 34 white sergeants and 1 black sergeant; while during this same time there were a total of 0 black lieutenants and 14 white lieutenants. The black police officers made up 6.7% of the work force at LRPD, however, they made up 0% of the lieutenant's positions and approximately 3% of the sergeant's positions. The District Court did not make this type of comparison findings during the RTF. Instead, the District Court made a comparison of the number of promotions received but included in its computations acting sergeants and a retired black police officer (Hunter), who was no longer employed at LRPD at the time of trial. This lawsuit involves sergeants and lieutenants and Hunter's promotion to captain is irrelevant.

From 1975 through 1981 blacks did not receive 8.7% of the promotions to sergeant and lieutenant as the Petitioner's would have this Court believe but instead received 0% of the promotions to sergeant and lieutenants. One cannot consider the two acting sergeants that were appointed because the acting

sergeants could not be made permanent sergeants without retaking the sergeant's exam. In fact one of those acting sergeants, Billy O'Donald, was placed number 4 on the 1983 certified list and did not receive a promotion to sergeant. As of today's date, O'Donald is a patrolman. (C.Ct.A. A9)

Respondents have discussed the promotions in relation to the qualified pool and the acting sergeants because the Circuit Court addressed these issues in its opinion illustrating their disapproval of the manner in which Petitioners' statistics were computed in order to rebutt Respondents' prima facie case of disparate treatment and impact. (C.Ct.A.A9)

This Court's attention is now directed to the 4/5's rule violations existing in this case.

C. THE BOTTOM LINE APPROACH IN THE CASE AT BAR PRODUCES A 4/5'S RULE VIOLATION.

A prima facie case of adverse impact was found by the District Court and this finding was found to be rebutted by the Petitioners. This latter conclusion was based on the comparison of average scores. This conclusion was based on an improper view of the law and, as discussed above, the comparison of averages is an inadequate analysis when dealing with a rank order system. (C.Ct.A.A12)

Therefore, on remand the Court in considering the bottom line approach should also analyze the subparts of the selection procedure in detail. The bottom line reveals 0 blacks promoted during the RTF to sergeant while 19 whites were promoted. This produces a 4/5's Rule Violation. Additionally, from 1975 to 1979, inclusive, there were 25 whites promoted out of 146 whites competing for promotion to sergeant and there was 1 black promoted out of 10 blacks competing for promotion to sergrant. This also produces a 4/5's Rule Violation. This bottom line analysis deals with the figures for the people that are ultimately promoted to sergeant from the overall composite score.

As far as lieutenants are concerned, there were 0 blacks promoted to lieutenants during the RTF while during the same period there were 5 whites promoted to lieutenant which produces a 4/5's Rule Violation.

Suffice it to say that the case now before this Court produces a 4/5's Rule Violation in the following areas:

1. *Hiring* (1977-1979);

2. *Ultimate promotion selection rate during RTF* (Sergeants and Lieutenants); and

3. *Ultimate promotion selection rate from 1975 to 1979 inclusive* (Sergeant and Lieutenants).

As stated above, the hiring statistics for 1977-1979 also produces a 4/5's Rule Violation. In 1977 and 1978 there were 0 Blacks hired and in 1979, there were 7 Blacks hired. During this same 3 year period there were 53 whites hired. It is significant to note that of the 7 blacks hired in 1979, 6 were cadets and therefore probably should not be included in the 4/5's Rule computation for adverse impact. Even if one includes these 6 cadets, the computation still produces a violation of the 4/5's Rule. *Surprisingly,* there was actually a decrease in the total number of blacks for the following year even after the hiring in 1979 as revealed below:

Year	No. Black Officers	Year	No. Black Officers
1975	14	1978	14
1976	15	1979	16
1977	15	1980	15

Therefore, the only answer to this interesting development would be the retention rate of blacks hired. There must have been 8 blacks discharged or forced out of LRPD between 1979 and 1980, since 7 blacks were hired but there was not a corresponding overall increase. (D.X.7B-3; 7B-7; P.X.1-6) (R.A. E1, M1; C3)

The above statistics produced a prima facie showing of adverse impact on behalf of the Respondents at the District Court trial. The District Court found that this prima facie showing of adverse impact was rebutted primarily because of the Court's comparison of the average scores of the subparts of the promotion system itself. (C.Ct.A.A8) The Circuit Court found this to be an erroneous legal standard and ordered the District Court to probe beyond the simple comparison of the average scores because of the "rank order nature" of the promotion system. (C.Ct.A.A11)

D. THE COURT OF APPEALS RREMANDED THE DECISION OF THE DISTRICT COURT ON DISPARATE IMPACT AND DISPARATE TREATMENT.

Contrary to the statements of Petitioner at pages 4, 7, and 8 of its Brief, the Circuit Court has held that the District Court's finding, that the *prima facie* cases of *disparate treatment* were rebutted by the promotional system, is *also infirmed* due to the incorrect analysis of the District Court. The Circuit Court discussed the *prima facie* findings of *disparate treatment* by the District Court and the rebuttal of these prima facie cases by an analysis of the promotional system and then reversed the District Court because of an inadequate focus on the promotional system. Therefore, disparate treatment is still an issue on remand. (C.Ct.A.A9)

Petitoner states that the Circuit Court has improperly applied Rule 52, FRCP. Respondent will now discuss this issue.

IV.

THE COURT OF APPEALS COMPLIED WITH THE REQUIREMENTS OF RULE 52 OF THE FRCP.

The District Court found the promotion selection procedure used at LRPD was valid under the Uniform Guidelines. This decision was principally based on the fact that the District

Court found no adverse impact in the written exam or any of the subparts. The reason the District Court found no adverse impact by the subparts was principally based on the comparison of average scores of blacks and whites. (C.Ct.A.A8) The Circuit Court addressed the issue of adverse impact and found that the trial judge applied *an erroneous legal standard* in reaching her conclusion because the District Court failed to adequately focus on the interrelationship of the component parts which is necessary when there is a rank order system involved in the promotional process. The Circuit Court remanded this case to the District Court so that it may apply the proper legal standard in reaching its conclusions of law and findings of fact.

A. THE CIRCUIT COURT DID NOT MAKE ANY FINDINGS OF FACT.

Petitioners stated that the following conclusions of the Circuit Court were inconsistent with the District Court findings. Each of these conclusions will be addressed to demonstrate that they are not inconsistent with the District Court's findings. (Pet. Brief p. 21) The allegedly inconsistent findings are as follows:

1. The Circuit Court concluded that at the time of the trial there was only one black sergeant at LRPD. This is a correct conclusion, it is not inconsistent with the findings of the District Court because Clarence Hunter had retired at the time of trial and the only other black personnel in supervisory positions beside Grady Anthony were two acting sergeants neither of which were permanent. Therefore, there was only one black police officer in a permanent supervisory position at LRPD. There was 1 black permanent sergeant, 0 black lieutenants, 0 black captains, and above.

2. The Circuit Court concluded that the District Court did not focus on the interrelationship between the components of the promotion procedure and the Petitioner argues that this ignores the District Court's findings concerning bottom line adverse impact. (Pet. Brief p. 21) The District Court did not consider the bottom line effect on the ultimate promotion selection

rate and its interrelationship with the oral interview scores other than to look at the average scores. The Circuit Court stated that in a rank order system a comparison of average scores was an inadequate focus and therefore incorrect.

3. The Petitioner argues that the District Court focused on the ranking aspect of the promotional list when it looked at the bottom line concept. (Pet. Brief p. 22) This is not inconsistent with the findings of the Circuit Court since the District Court did not focus on the interrelationship beyond the average scores approach. Petitioner has failed to understand that the Circuit Court is requiring a detailed analysis in a rank order composite score system that goes beyond a simple comparison of averages. Therefore, the District Court's analysis was improperly performed under an erroneous view of the law.

4. The Petitioner argues that the Circuit Court's conclusion that "the procedures did not preclude oral panelists' access to candidate's scores on the written examination" was inconsistent with the District Court's finding that "the oral panelist did not know the candidates' written score." (Pet. Brief p. 22) This is not an inconsistent finding by the Circuit Court. The Circuit Court reached the conclusion that the oral panelist members were not *precluded* from knowing the written scores. The petitioners' principal witness was a white chief of police, Mr. Walter E. "Sonny" Simpson, who in response to the question of whether or not there was a rule that prevented supervisors from obtaining the written scores from persons participating in the promotional process stated as follows:

> Such a rule would be totally unenforceable with police officers, because they are entitled to discuss anything that they have personal knowledge of. If they don't want to discuss their scores, they won't. If they do want to discuss their scores they will discuss them with anybody they want to. (Simpson, T. 1559); (R.A. L3)

Obviously, it would be quite simple for the oral interview to be given prior to the written exam and this would *preclude* oral panelist's access to candidate scores on the written exam.

5. The Petitioner argues that the Circuit Court concluded that the standardized oral interview *responses* were not introduced until 1979 and that this is inconsistent with the District Court's finding that they used standardized *questions* in 1978. (Pet. Brief p. 22) The issue is standardized *responses*, not questions. The Circuit Court's conclusion is not inconsistent with the District Court.

6. The Circuit Court noted that LRPD did not stop using Chief's points until 1978 and the petitioner states that this procedure was stopped after the 1977 sergeant's exam. (Pet. Brief p. 22, 23) This finding is argued to be inconsistent with the District Court's findings of fact. This argument overlooks the fact that the 1977 sergeant's exam was certified and actually used for promotions until September of 1978 when the list for 1978 was certified. This is not an inconsistent finding.

7. The Circuit Court also stated that the District Court should apply the close scrutiny rule in reviewing the promotional system at LRPD. Petitioner argues that this is inconsistent with the District Court's finding that the objectivity of the oral interview is safeguarded. (Pet. Brief, p. 23).

To say that the District Court meant that the oral interview was objective is an erroneous interpretation. Actually, the District Court's statement carries with it the explicit implication that the oral interview is based on subjective criteria. Otherwise, why would the District Court refer to safeguarding objectivity. What the Circuit Court said was when subjective criteria is present coupled with white supervisors, the District Court must closely scrutinize such a system.

It is undisputed that the upper echelon of LRPD was substantially all white. The oral panelists who were captains were all white in all years of the RTF with the exception of the year when Clarence Hunter was a panelist and the olympic system was used whereby the high and low scores were thrown out. In fact, even though the oral interview panel might include

1 black panelist, the Circuit Court's statement addresses the fact that the decisions were made by white supervisors and all but 1 of the supervisors were white.

It is significant that at the time of trial there was 1 black sergeant, 0 black lieutenants, 0 black captains and above. Additionally out of 5 members the Little Rock Civil Service Commission, there has never been more than 1 black on the Civil Service Commission which certifies the promotion lists. Respondents stress the figure of 1. Here the Circuit Court was holding as a matter of law that the District Court should comply with the "close scrutiny" requirements of *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, ____ U.S. ____, 1035 S.Ct. 1772 (1983), and *Coble*, *infra*, when the facts of this case dictate the application of that rule.

In summary, it is apparent that the Court of Appeals did not reverse any findings of fact of the District Court but rather reversed the District Court's decision because of its *erroneous view of the law* and ordered further proceedings consistent with the Circuit Court's decision. Respondent will now address the Cicuit Courts proper use of the clearly erroneous rule in the decision itself, thereby indicating the degree of its understanding of the clearly erroneous rule.

B. THE CIRCUIT COURT PROPERLY USED THE CLEARLY ERRONEOUS STANDARD WITHIN ITS DECISION AND THEREFORE REVEALED ITS UNDERSTANDING OF THE CLEARLY ERRONEOUS RULE AND APPLIED THE CLEARLY ERRONEOUS RULE PROPERLY IN ITS DECISION.

The Petitioners have argued that the Circuit Court failed to apply the clearly erroneous rule in its review of the District Court's opinion. In this connection it should be noted that the Circuit Court specifically used the term "clearly erroneous" early in its decision. In fact, the Circuit Court made the following statement:

> A Court of Appeals may only reverse a District Court's finding of discrimination if it concludes that the finding is clearly erroneous under Rule 52(a). *Pullman - Standard v. Swint*, 456 U.S. 273, 290 (1982); *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 723 (8th Cir. 1982) (*Coble*). (C.Ct.A.A4)

The Circuit Court then defined the term "clearly erroneous rule", and applied this standard to the Respondent's proof of racial harassment and specifically held that:

> "We express our strong disapproval of the degree of racial harassment at the Little Rock Police Department. However, under the clearly erroneous standard we must affirm the District Court's finding that this degree never rose to the level of a Title VII violation. (C.Ct.A.A6)

Therefore, the Circuit Court understood and properly applied the clearly erroneous standard throughout its decision to the District Court's findings of fact and in remanding this case to the District Court, the Circuit Court evidenced this knowledge and application of the "clearly erroneous rule". The Circuit Court reversed the case because of the District Court's *erroneous view of the law.*

V.

CONCLUSION

In conclusion, the Circuit Court remanded the case to the District Court to allow its findings to be made consistent with the law as interpreted by the Circuit Court. The Circuit Court directed the thrust of the probe to be made by the District Court and gave the District Courts specific guidelines to follow in reaching its own findings of fact and did not interfere with or intrude into the fact finding province of the District Court. This case does not involve a novel question of law but simply applied existing law to a complex set of facts involving a city that has a history of racial problems. The Circuit Court's decision involves

a rank order composite score promotion system which by definition treats every point, in the promotion cycle, as meaningful. Therefore not only the law but common sense dictates the approach taken by the Circuit Court.

Respectfully submitted,

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